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In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN F. WALL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

PAGE

Opinion of the Court Below 2

Jurisdiction 2

Questions Presented For Review 2

Constitutional and Statutory Provisions and Regulations Involved 3

Statement of the Case 7

Reasons For Granting The Writ 14

Conclusion 22

Appendices:

Appendix A—Opinion of the United States Court of Appeals ..... App. 1

Appendix B—Order denying Petition for Rehearing ..... App. 10

AUTHORITIES CITED

Cases

Aetna Life Insurance Co. v. Haworth, 300 U.S. 227 (1937) 12

Coffin v. Coffin, 4 Mass. 1 21

DeFunis v. Odegaard, 416 U.S. 312 (1974) 12

In re DiBella, 499 F.2d 1175 (2 Cir. 1974) 15

In re Grand Jury Proceedings, 563 F.2d 577 (3 Cir., 1977) 20

In re Tierney, 405 F.2d 806 (5 Cir., 1972) 16

PAGE

Kilbourn v. Thompson, 103 U.S. 168 (1881) 20, 21

United States v. Brewster, 408 U.S. 501 (1971) 20-21

United States v. Concentrated Export Association, Inc., 393 U.S. 199 (1968) 12

United States v. Craig, 528 F.2d 773 (7 Cir., 1976), *cert. den.*, 425 U.S. 973 (1976) 20

United States v. Craig, 537 F.2d 957 (7 Cir., 1976), *en banc*, cert. den. *sub nom. Markert* v. *United States*, 429 U.S. 999 ..... 10, 20

United States v. DiCarlo, 565 F.2d 802 (1 Cir., 1977), *cert. den.*, 98 S.Ct. 404 20

United States ex rel. Accardi v. Shaughnessy, 347 U.S. 261 16

United States v. Gillock, 587 F.2d 284 (6 Cir., 1978) 20

United States v. Giordano, 416 U.S. 505 ..... 14, 15, 16

United States v. Yanagita, 552 F.2d 940 (2 Cir., 1977) 15

Other Authorities

Article 6, Clause 2 of United States Constitution 3, 21

Fifth Amendment to United States Constitution 3, 21

Title 18, U.S.C. § 2516 ..... 14, 15

Title 18, U.S.C. § 6002 ..... 3, 7, 9

Title 18, U.S.C. § 6003 ..... 4, 12, 14, 15, 16, 18, 22

Title 18, U.S.C. § 6003(a) 9, 16

Title 18, U.S.C. § 6003(b) 2, 9, 10, 15, 16, 17

Title 28, U.S.C. § 455 8

Ttitle 28, U.S.C. § 510 ..... 14, 15

PAGE

Title 28, U.S.C. § 515 ..... 4, 8, 15

Title 28, U.S.C. § 515(a) 12

Title 28, U.S.C. § 541 ..... 5, 18

Title 28, U.S.C. § 543 ..... 5, 8

Title 28, U.S.C. § 545 ..... 5, 18

Title 28, U.S.C. § 1826 ..... 6, 7

28 C.F.R. § 0.131 ..... 6, 15

28 C.F.R. § 0.133 16

28 C.F.R. § 0.175 16

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, John F. Wall, prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals entered in this cause.

OPINION OF THE COURT BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit affirming the validity of the order of immunity directed to your Petitioner is not officially reported, but is printed in the Appendix hereto (Appendix A).

JURISDICTION

The Opinion of the United States Court of Appeals was filed on January 9, 1979 (Appendix A). A Petition for Re-Hearing timely made was denied on January 23, 1979 (Appendix B). This Petition is filed within the time period directed by law. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Can the Attorney General appoint from his office an attorney to make the "judgment" of possible necessity to the public interest, when the making of that "judgment" is by Act of Congress (Title 18 U.S.C. §6003(b)) reposed in the United States Attorney, subject to the approval of the Attorney General?

2. When the Congress dictates two functions in two separate offices, one to make a judgment, the other to review and approve that judgment, does it defeat clear legislative mandate to merge both functions into one office?

3. Do the principles of common law in light of reason and experience dictate the recognition of a federal common law legislative privilege to be applied in federal proceedings involving elected State legislators?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED.

Article 6, Clause 2 of the Constitution provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment V to the Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . .

Title 18 U.S.C. §6002 provides:

> "Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any

criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

Title 18 U.S.C. §6003 provides:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Title 28 U.S.C. §515(a) provides:

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General,

conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

Title 28 U.S.C. §543(a) provides:

"(a) The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires."

Title 28 U.S.C. §541 provides,

"(a) The President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district.

"(b) Each United States attorney shall be appointed for a term of four years. On the expiration of his term, a United States attorney shall continue to perform the duties of his office until his successor is appointed and qualifies.

"(c) Each United States attorney is subject to removal by the President."

Title 28 U.S.C. §545 provides:

"(a) Each United States attorney and assistant United States attorney shall reside in the district for which he is appointed, except that these officers of the District of Columbia and the Southern District of New York may reside within 20 miles thereof.

"(b) The Attorney General may determine the official stations of United States attorneys and assistant United States attorneys within the districts for which they are appointed."

Title 28 U.S.C. §1826 provides:

> "(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—
>
> "(1) the court proceeding, or
>
> "(2) the term of the grand jury, including extensions,
>
> before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.
>
> "(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal."

28 CFR §0.131 provides:

> "Each U.S. Attorney is authorized to designate any Assistant U.S. Attorney in his office to perform the functions and duties of the U.S. Attorney during his absence from office, and to sign all necessary documents and papers as Acting U.S. Attorney while performing such functions and duties."

STATEMENT OF THE CASE

This case comes from the United States Court of Appeals for the Seventh Circuit on expedited appeal as mandated by Title 28, U.S.C. §1826, having begun by the filing of a Petition on November 3, 1978, for an Order Granting Petitioner Immunity pursuant to Title 18 U.S.C. §6002. The salient factors leading to affirmance occurred prior to the Petitioner being subpoenaed as a witness. We have attempted to set them forth chronologically hereinafter.

The Special September 1978 Grand Jury (II) for the Northern District of Illinois is, among other things, engaged in an on-going investigation of legislation considered by the General Assembly of the State of Illinois in connection with currency exchanges operating within the State.

The present United States Attorney for that District is one Thomas Sullivan. It has been represented in this proceeding, and your Petitioner accepts the representation, that Mr. Sullivan, prior to his appointment, acted as attorney for some form of confederation of currency exchange operators. We are aware that this is somewhat vague, but it represents all detail of which we are apprised. Whether Mr. Sullivan's representation took him into contact with members of the General Assembly through lobbying, or otherwise, we do not know. Whatever the representation entailed, Mr. Sullivan deemed it sufficient to himself that his conducting the Grand Jury investigation was inappropriate or unwise. He recused himself, and all his assistants, from activity in this area.[1]

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[1] The Seventh Circuit decision reflects that Mr. Sullivan determined to recuse "on grounds of conflicting interests". (Appendix A, p. 2) We accept that on faith. But the opinion continues later

(footnote continued)

In apparent response to this withdrawal by Mr. Sullivan, a certain Mr. Keuch, an acting Assistant Attorney General, purporting to act on behalf of a Mr. Benjamin Civiletti, an Assistant Attorney General, addressed a communication to one Thomas H. Henderson, who is described by Mr. Keuch in the content of the letter "as an attorney for the government employed full-time by the Department of Justice and assigned to the Criminal Division . . ." purporting to authorize and direct him to file informations and to conduct legal proceedings which United States Attorneys are authorized to conduct.[2]

Pursuing the investigation described above, Mr. Henderson, through his assistant, Mr. Kerr, caused a Grand Jury subpoena to issue to the Petitioner, Mr. John F. Wall.

(footnote continued)

"Since the United States Attorney has recused himself from this case however the witness concedes that the immunity request could not be made by Thomas Sullivan". (Appendix A, p. 5, fn. 4) No such concession was ever made. While we do not think it an important factor, concessions *should* not be so casually attributed. The law makes no provision for a United States Attorney's recusal (compare Title 28 U.S.C. §455), we find no occasion to do so, nor to "concede" any propriety to abdication of his statutory duties.

[2] The trial court judge considered this appointment to be made under the authority of Title 28 U.S.C. §543, which authorizes the Attorney General to appoint Special Attorneys "to assist United States Attorneys when the public interest so requests." The Court of Appeals for the Seventh Circuit found the source of appointment in Title 28 U.S.C. §515(a), which allows an attorney specifically appointed by the Attorney General and acting under specific direction to "conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceedings is brought." (Appendix A, p. 6)

Mr. Wall was, for many years, an Illinois legislator and a member—sometimes chairman—of the Committee charged with consideration of laws regulating currency exchanges within the State.

At some point, Mr. Henderson requested, purportedly pursuant to the provisions of Title 18 U.S.C. §6003(b), the Attorney General's approval to make a request that the Court grant Mr. Wall immunity.[3]

Mr. Civiletti, as a "designated Assistant Attorney General" (Title 18 U.S.C. §6003(b)) gave approval to the "request", and Mr. Henderson, again acting through his assistant, Mr. Kerr, petitioned the District Court for an order granting immunity under §6002. The petition, directed toward satisfying the provisions of §6003(a) that the order issue "upon the request of the United States Attorney" for the Northern District of Illinois, incorporated in his Petition:

> "It is our judgment as Chief Public Integrity Section, Department of Justice and *Acting United States Attorney* for the Northern District of Illinois for this investigation, No. 76 GJ 560 only, that the testimony of JOHN F. WALL, in regard to the above-described investigation before the Grand Jury is necessary in the public interest, as is the production of books, papers or other evidence he may have in his possession or control." (Doc. 1) (Our emphasis)

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[3] This request is not part of the record because of an indisposition of the Public Integrity Section of the Department of Justice (of which Mr. Henderson is Chief) that matters and things set forth therein are premature for, or improper to, divulgence. There is no question, however, that Mr. Henderson made the "request" and also made the determination that Mr. Wall's testimony "may be necessary to the public interest" as required under §6003(b).

The immunity order issued subject to any later objections, the qualifications on issuance were due to practical considerations not pertinent here, in due course, at the request of the Department of Justice, an Order to Show Cause why the direction to Mr. Wall to testify and produce evidence should not be enforced issued, a procedure also dictated by practical considerations not pertinent nor a subject of contest.

The Return to The Rule put into issue the authority of Mr. Henderson to make the determination of the possible demands of the public interest and to make the "request" for the Attorney General's approval under §6003(b), the statutory conditions precedent to Petitioning for, and securing, the immunity order from the Court. The Return also invoked what it proposed as the common-law privilege of State Legislators, customarily defined in constitutional provisions respecting Speech and Debate.

As to the latter ground the trial court found itself bound by the Seventh Circuit decision reported in *United States* v. *Craig,* 537 F.2d 957 (1976), and on appeal the Seventh Circuit, *sub silentis,* declined reconsideration of the *Craig* decision.

On the former ground—the authority of Mr. Henderson, the misgivings of the trial court were resolved on the basis of official regularity.[4]

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[4] The Court: I am reluctant even to suggest that somewhere along the way Congress might straighten this out. We are left with a bit of confusion. It is difficult for you, it is difficult for the United States and it is difficult for—

Miss Lavin: Mr. Wall.

The Court: —Mr. Wall. It may be that Mr. Wall would say, "If Mr. Sullivan thinks that my testimony is necessary to

(footnote continued)

The Trial Court granted a stay of its order sufficient to appeal and docket in the Court of Appeals and to make request for a stay extension there. The Court of Appeals denied repeated requests to extend the stay. Faced with the threat of immediate incarceration, the Petitioner pro-

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(footnote continued)

the public interest, I'll respect it, because he is the man appointed with the advice and consent of the Senate by the President of the United States. But I have no respect for, nor interest nor belief in the intelligence of a Mr. Henderson, who is just an attorney working for the government in Washington who is hired as a full time attorney in the Criminal Division in Washington, coming down here and exercising authority about this community and the public interest that is circumscribed by the community in which this is transpiring."

United States Attorneys are from districts appointed by the President in that they are to represent the thinking of the community, the community from which he, Mr. Wall, comes, and that that should never be preempted by an underling in the Department of Justice who comes in to Chicago by plane for the first time in his life and asserts the authority of a presidential appointee. So I can understand his standing on his—what is it—on his dignity, too. So it is a question, but I think that I have the obligation without further guidance to read the statutes to leave the presumption of regularity, except where it clearly has been shown that it is totally irregular, and I have tried to do so by reading Sections 543 of Title 28 and 6003 of Title 18 in such a manner as to cause the letter of April 27th, 1978 of Mr.—

Mr. Kerr: Henderson.

The Court: No, this is Robert L. Keuch, K-e-u-c-h—I am sure he is a fine gentleman, but we here in the Northern District of Illinois have never heard of him—Mr. Keuch to Mr. Henderson—sufficient authority to justify the grant of immunity which apparently Mr. Keuch's superior granted on the request of Mr. Keuch that I grant immunity to Mr. Wall. So it is.

ceeded to testify as directed, and he continues his testimony to this day, whenever, and as, he is directed so to do.[5]

The Court of Appeals found that 28 U.S.C. §515(a) did authorize the immunity petition under 18 U.S.C. §6003 *in the circumstances of this case,* continuing:

> "Whether Section 515(a) should always be read to authorize a special attorney to exercise the powers of a United States Attorney under 18 U.S.C. § 6003 is a question we need not reach. In most instances it may be desirable, or perhaps even mandatory, for the United States Attorney for the district, or his designate, to participate in the section 6003 request. *See In re DiBella,* 499 F.2d 1175, 1177-78 (2d Cir.), *cert. denied,* 419 U.S. 1032 (1974).
>
> The factual circumstances of this case, however, make it entirely appropriate to read section 515(a) as conferring section 6003 authority on the special attorney. Section 6003 will not be undermined by the construction here because two facts demonstrate that in this case, the special attorney should be considered to be the United States Attorney named in Section 6003. First, this is a case of recusal. The statute cannot be read to require the participation of a United States Attorney who has conflicting interests. It is, therefore, only reasonable to permit the individual essentially acting in his capacity—the special attorney—to exercise the immunity power. Certainly this result is more consistent with the statutory purpose

[5] The government made the argument on appeal that the case was mooted by Petitioner's electing testimony over the confinement alternative. The Court, however, found "a substantial continuing controversy" within the scope of this Court's decisions in *DeFunis* v. *Odegaard,* 416 U.S. 312, 317 (1974); *Aetna Life Insurance Co.* v. *Haworth,* 300 U.S. 227, 240-41 (1937); *United States* v. *Concentrated Export Association, Inc.,* 393 U.S. 199, 203 (1968). (Appendix A, pp. 3-4).

> than permitting the witness to evade testifying in light of the conclusion reached by other courts that the statutory requirements 'were not intended to protect witnesses but to minimize overuse of immunity grants.' *United States* v. *Yanagita,* 552 F.2d 940, 947 (2d Cir. 1977). *Cf. In re Tierney,* 465 F.2d 806, 813 (5th Cir. 1972), *cert. denied,* 410 U.S. 914 (1973)." (Appendix A, pp. 7-8)

This conclusion the Court of Appeals found buttressed by a letter of the predecessor United States Attorney who apparently[6] advised that a Department of Justice attorney be assigned to oversee the investigation and be given final authority "to make the necessary investigative and prosecutorial decisions. . . ." (Appendix A, p. 8)

[6] This "letter" was never shown to Petitioner, nor his counsel. So far as the content is concerned, we are apprised only so far as they are quoted in the Court of Appeals opinion (Appendix A) and only after the opinion was filed and published.

REASONS FOR GRANTING THE WRIT

We respectfully request this Court to grant its Writ of Certiorari to review the judgment of the Court of Appeals in this case on the following grounds:

1. This case presents a delegation by the Attorney General of the statutory authority of the United States Attorney. It is in direct conflict with, and goes beyond in conflict, this Court's decision in United States v. Giordano, 416 U.S. 505.

In *Giordano,* this Court was addressing a not dissimilar statutory mandate from that involved here. Section 6003 requires a "request" by the United States Attorney for approval by designated officials of the Attorney General's office (the Attorney General, the Deputy Attorney General or a designated Assistant Attorney General) to apply for an immunity order, "when in his [a United States Attorney's] judgment—(1) the testimony or other information from such individual may be necessary to the public interest; . . ." *Giordano* considered § 2516 of Title 18, U.S.C. which allowed a United States Attorney to apply for a wire-tap authorization only upon approval from the Attorney General or his Assistant Attorney General designate. Apparently under the delegation authority in Title 28, U.S.C. § 510, the Attorney General delegated *his* authorized approval power to his Executive Assistant. This Court determined that such delegation effected a defeat of the Congressional direction.

Here, under § 6003, the Congressional concern clearly encompasses a concurrence by the Attorney General (or

his designated Assistant) and the United States Attorney that a grant of immunity is desirable. (See *In re DiBella,* 499 F.2d 1175, 1177 (2 Cir. 1974)). Here we go beyond *Giordano.* The Attorney General has delegated, not his own authority, but that of the United States Attorney, a delegation not even statutorily arguable.[7]

Any suggestion that the broad language of §515 (enacted in 1966) temporizes the specific designation of §6003 (enacted in 1970) was settled by this Court in *Giordano,* where similar language as to the Attorney General's approval was determined an exclusive mandate under Title 18 U.S.C. §2516, unrelieved by the Attorney General's power of delegation under Title 28 U.S.C. §510. Logic repels any suggestion that the requirements designating the author of the "request" for approval can be less exacting than those of the approver.

The Court of Appeals proposes its result is justified because the purpose of the specificity of the statute was a rein on the excesses of the executive, not the protection of the witness (Appendix A, p. 8). The Petitioner-witness, it concludes, is in no position to complain. It relies on two cases.

The first was *United States* v. *Yanagita,* 552 F.2d 940, 947 (2 Cir., 1977) where the *mode* of designation of "any designated Attorney General" (18 U.S.C. §6003(b)) by

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[7] We are aware of the regulatory authority of Mr. Sullivan to delegate his authority to one of his assistants (28 C.F.R. §0.131). Whether that regulatory power would prevail over the statutory imperative is not necessary to reach, since Mr. Sullivan made no delegation. The letter of his predecessor, Mr. Skinner, is equally noncompelling. No residual powers, or powers in perpetuity, exist in the former office holder.

regulation (28 C.F.R. §§0.175, 0.133) was the issue, a question certainly not present here. The second case concerned a failure to follow intermural guidelines (*In re Tierney,* 405 F.2d 806, 813 (5 Cir., 1972), another issue not present here, since we make our contentions *strictly* within the mandate of the statute. These cases are no authority for reliance.

The conclusion of the Court of Appeals that the Petitioner-witness cannot be heard to complain defies realities. It is the witness who is being stripped of several of the few civil rights secured to him (the right of privacy and against self-incrimination, and, if existent, the common-law speech and debate privilege). There is no cogent reasoning nor authority behind the imperious statement that the statutory provisions are not to protect the witness. The same type of sophistic proposal was made in respect of the wiretap in *United States* v. *Giordano,* 416 U.S. 505, and there rejected by this Court.

On almost *every* conceivable plane, this case should be governed by this Court's determinations in *Giordano.*

2. The merging of the dual functions directed by §6003 (b) into a unitary function of the Attorney General, and one of his attorneys, amends the statute. Aside from this invasion of legislative function by the executive, the case presents a direct conflict with applicable authority of this Court expressed in United States ex rel. Accardi v. Shaughnessy, 347 U.S. 261.

The statute is unambiguous:

> "§ 6003. Court and grand jury proceedings
>
> "(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, *upon the request of the United States attorney for such district,* an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.
>
> (b) *A United States attorney* may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, *request* an order under subsection (a) of this section when *in his judgment—*
>
> (1) the testimony or other information from such individual *may be necessary to the public interest;* and
>
> (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination." (Our emphasis)

The Court will note that, while the authority to *approve* the request is vested in any of an almost unlimited number of persons, and is prone to uninhibited designation, the power to *request* is vested in the United States Attorney alone.

Similarly, the Administrative and Congressional News speaks singularly of the authority to petition, and of the incidents necessary to activating the request:

> "With the approval of the Attorney General, Deputy Attorney General, or assistant attorney general who is designated by the Attorney General, *the U.S. attorney* may seek a court order. *He must be satisfied that the testimony is needed in the public interest* and the

witness must have refused or be likely to refuse to testify, claiming self-incrimination." (See 1970 at p. 4018) (Our emphasis)

This is a statutory imperative that does not allow of informal unauthorized designations. Where there is Congressional mandate, and where it is particularly apparent that alternate designation (as in the case of approval by the Attorney General) was recognized and, if considered appropriate, could have been authorized by the Congress, and where it did not elect to do so, the clear evidence of the Statute itself denies oversight, and precludes loose interpretation.

Clearly the Statute speaks of the United States Attorney. Clearly it regulates to *him* the power to make, and exercise, "his *judgment.*" The United States Attorney must have special qualifications. He must be appointed by the President, with the advice and consent of the Senate. (Title 28 U.S.C. §541) He must be resident of the District in which he acts as attorney for the government. (Title 28 U.S.C. §545) We are unable to explain by what endowment the Attorney General arrogates to himself the facile resolution he has assumed by having one of *his* assistants through one of *his* deputy assistants (See Doc. 13) appoint one of *his* attorneys to act in lieu of the presidential appointment, an appointment of equal dignity to his, the Attorney General's own.

The Congress, in §6003, directed two separate steps by officers independent of each other, each operating in a specific and different area. The procedure implemented here would merge the diverse operations into a single function performed under the authority of a single functionary.

In significantly less auspicious circumstances, this Court rejected the intrusion of the Attorney General into an area

where *executive regulation*—as opposed to Statute—gave the Board of Immigration Appeals power to exercise discretion subject to review by the very source of the regulation itself, the Attorney General. Speaking to the independent and separate functions, this Court said:

> "The regulations just quoted pinpoint the decisive fact in this case: the Board was required, as it still is, to exercise its own judgment when considering appeals. The clear import of broad provisions for a final review by the Attorney General himself would be meaningless if the Board were not expected to render a decision in accord with its own collective belief. * * * And if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience." (347 U.S. at 266-7)

The majority of this Court found the Regulations authored by the Attorney General established its independence, and he bound himself to those restrictions. No such Regulations exist here.[8] Here we have "an attorney . . . employed full time by the Department of Justice and assigned to the criminal division. . . ." He operates directly under and is answerable to the Attorney General. His decisions, in law, are the decisions of the Attorney General. Compare the dissent in *Accardi,* 347 U.S. at pp. 269-70.

Thus, the duality of function contemplated by the statute is defeated. The necessary independence of judgment defined by this Court in *Accardi* is rejected.

Congress vested in the United States Attorney, and in him alone, the discretion to exercise his judgment in this

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[8] Though did they exist, we would contend their conflict with the legislative mandate.

area. It gave the Attorney General no power of initial judgment, merely the power to review and evaluate a judgment formed. He cannot—under the guise of serving an unanticipated expediency—seize a power that Congress denied him.

3. The question of whether this Petitioner is entitled to a common-law speech and debate privilege against inquiry by the United States—or anyone else—into the activities and their underlying bases, when within the scope of State legislative activity has divided the Circuit Courts of Appeals,[9] and has not been, but we submit, should be, decided by this Court.

The several Circuits give the preponderance in favor of the recognition of such a privilege, though the Seventh Circuit persists in withholding it, notwithstanding it has been repeatedly requested to reconsider.

Though this Court has until now rejected several petitions of litigants to speak directly to the issue here presented, applicable decisions of this Court tend to indicate the privilege exists. First addressing the question in *Kilbourn* v. *Thompson,* 103 U.S. 168 (1881), this Court directed broad application of the privilege. In *Kilbourn,* as well as in all civil rights cases involving state legislators, deference has been given the privilege. In *United*

[9] *United States* v. *Craig,* 528 F.2d 773 (7 Cir., 1976), cert. den., 425 U.S. 973 (1976); *United States* v. *Craig,* 537 F.2d 957 (7 Cir., 1976), *en banc,* cert. den. *sub nom. Markert* v. *United States,* 429 U.S. 999; *United States* v. *DiCarlo,* 565 F.2d 802 (1 Cir., 1977), cert. den., 98 S.Ct. 404; *In re Grand Jury Proceedings,* 563 F.2d 577 (3 Cir., 1977), and the very recent decision in *United States* v. *Gillock,* 587 F.2d 284 (6 Cir., 1978), wherein we are advised the suggestion of the government for re-hearing *en banc* was denied in January of this year.

States v. *Brewster,* 408 U.S. 501 (1971), this Court quoted with approval from *Coffin* v. *Coffin,* 4 Mass. 1 (a state case) prohibiting inquiry. If the privilege applies, it provides protection in the broad sense directed in *Kilbourn* against actions in the criminal context, as well as the civil; against the Executive, as well as private individuals.

In this context, we further submit that this Court should inquire and define whether the Supremacy clause of the Constitution (Article 6, Clause 2) is ill applied in the area of co-existing sovereigns, where the concept of that co-existence is independence and equality—not supremacy.

We also submit that the privilege secured by 43 of the 50 states, including Illinois, the English Bill of Rights, the Articles of Confederation of the United States, as well as the Constitution itself as it concerns United States legislators is imposingly indicative of the historic significance of the question presented, and the importance of resolution in this contest between the legislative arm of the State as a sovereign and the executive component of the co-ordinate federal sovereignty.

4. This case represents a palpable rejection of consistency in application of the laws, and plainly states that its decision here is of doubtful application otherwise. It is forthright in denying to this Petitioner relief it would otherwise grant. In its supervisory power this Court should reject an admitted unequal protection of the laws, insured by implication in the due process clause of the Fifth Amendment.

The dissent in *Accardi* repeated the adage that "Hard cases make bad law." (347 U.S. at p. 268) Added to the speech and debate question and the application of the privilege, if it exists, to a state legislator, is the aspect of a

competent man to fill the august position of United States Attorney, but whose personal fastidiousness directs that he not engage in a particular investigation, and who in his personal restraint, declines to exercise a power bestowed on the office he holds. In deference to those scruples, the Courts below have found occasion to avoid the mandate of the law and seize upon an expediency—but at the same time rejecting that expediency (See Appendix A, p. 7), saying that what has been excused here (the participation of the United States Attorney, in the §6003 request) may be desirable in most cases, and mandatory in some.

We submit to the Court that such social graces are admirable in the ambit of *laissez faire* and *noblesse oblige*. But they are intolerable in a nation of laws, not of men. No expediency has ever ultimately in this country been found sufficient to suspend its laws.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully prayed that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

EDWARD J. CALIHAN, JR.
ANNA R. LAVIN

Attorneys for Petitioner

APPENDIX

APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

No. 78-2505

IN THE MATTER OF THE SPECIAL SEPTEMBER 1978 GRAND JURY (II)

JOHN F. WALL, Witness, *Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78 GJ 560 — JAMES B. PARSONS, *Judge.*

ARGUED DECEMBER 19, 1978 — DECIDED JANUARY 5, 1979

Before SWYGERT, CUMMINGS, and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* John Wall, a witness summoned to testify in a continuing grand jury proceeding, appeals from the district court order finding him in contempt for refusal to testify after a judicial grant of use immunity. The issues presented on appeal are whether the case is moot and whether the order of immunity was obtained in compliance with 28 U.S.C. § 6003.

I.

The Special September 1978 Grand Jury (II) for the Northern District of Illinois has been investigating possible violations of various federal statutes in the Northern District. The United States Attorney for the District, Thomas Sullivan, recused himself and his office from conducting this investigation on grounds of conflicting interests. An Assistant Attorney General, Benjamin Civiletti, designated an attorney in the Department of Justice in Washington, Thomas Henderson, to conduct the grand jury proceeding here in the Northern District.[1]

On September 28, 1978, John Wall, a state legislator, appeared before the grand jury pursuant to a subpoena, but refused to testify. He asserted both a constitutional and legislative privilege. On November 3, 1978, Thomas Henderson petitioned the district court under 28 U.S.C. § 6003 for an order granting the defendant immunity. The court entered the immunity order to compel testimony. On November 16, John Wall was again called before the grand jury and again he refused to testify. On that date, the government attorney moved for a rule to show cause why the witness should not be held in contempt.

The judge heard the arguments of the parties on November 29, determined that the immunity order complied with legal requirements, and found the defendant in contempt for his November 16 refusal to testify. The judge committed the witness to confinement for the duration of the grand jury proceeding but not to exceed 18 months, or until the witness obeyed the order to testify.

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[1] The Assistant Attorney General derives his authority to designate special attorneys from 28 C.F.R. § 0.13, allowing the Attorney General to delegate his power of designation to Assistant Attorney Generals and Deputy Assistant Attorney Generals. The witness does not challenge the validity of this regulation.

The trial judge stayed execution of the sentence until December 4, to allow time for the filing of an appeal. The appeal was filed November 29, 1978, but a further stay of execution was denied by this court.

On December 5, 1978, the witness informed the judge that he was willing to comply with the court order to testify in order to avoid incarceration. The witness testified before the grand jury on December 7. The subpoena was continued for further appearance as may be directed by the person conducting the grand jury proceedings.

II.

The government has argued that the dispute between the parties is moot. John Wall's decision to testify did prevent the district court order of confinement from being executed. Release from an order of custody is not the only relief that was sought by the appeal however. The witness also sought, through the contempt proceeding, to vacate the order of immunity.[2] On November 29, the district court resolved the challenge to the validity of the immunity order against the witness and entered the judgment of contempt. The fact the order of confinement has been mooted does not prevent this court from determining any remaining issue if it represents "a substantial con-

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[2] The immunity order was initially entered by the district court with the agreement that a judgment on validity would be made in a later proceeding. The witness filed a motion to vacate the order of immunity on November 8. The government filed a motion to strike the petition to vacate arguing that the proper procedure for challenging the immunity order was in response to a rule to show cause, relying on our decision in *In re Paul Perlin*, ... F.2d ..... (7th Cir. 1978). The parties as well as the judge considered the contempt proceeding as encompassing the prior request to vacate the immunity order.

troversy, between parties having adverse legal interests, of sufficient immediacy and reality. . . ." *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115, 122 (1974), quoting *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941); *Powell* v. *McCormack,* 395 U.S. 486, 496 & n.8 (1969).

The district court judgment on the validity of the immunity order does represent a substantial continuing controversy. The district court order granting the petition for immunity requires the witness to testify before the Special September 1978 Grand Jury (II) and produce documents, without resort to the privilege against self-incrimination. The order is not restricted by date,[3] and it has been estimated that this grand jury may continue through the fall of 1981. The government concedes that it may be necessary to call John Wall to testify again as the investigation proceeds. The witness, on the other hand, persists in his desire not to testify or produce documents. These facts clarify that the "controversy between the parties"—the validity of the immunity—is "definite and concrete," "touch[es] the legal relations of parties having adverse legal interests," and is therefore justiciable. *DeFunis* v. *Odegaard,* 416 U.S. 312, 317 (1974), quoting *Aetna Life Insurance Co.* v. *Haworth,* 300 U.S. 227, 240-41 (1937); *United States* v. *Concentrated Phosphate Export Association, Inc.,* 393 U.S. 199, 203 (1968). *See generally,* 6A

[3] The letter written by the Assistant Attorney General, Benjamin Civiletti, approving Thomas Henderson's request for immunity, authorized Mr. Henderson to petition the court for an order pursuant to 18 U.S.C. §§ 6002-03 "requiring John F. Wall to give testimony or provide other information in the [grand jury] matter and in any further proceedings resulting therefrom or ancillary thereto."

Moore's Federal Practice, ¶ 57.13 at 57-124, 57-128 (2d ed. 1974).

III.

The narrow issue presented by this appeal is whether Thomas Henderson, a special attorney appointed by the Assistant Attorney General to conduct a grand jury proceeding, when the United States Attorney has recused his office from the investigation, has authority to petition the court for an immunity order. We conclude that he does.

Congress established a procedure for granting witness immunity in 18 U.S.C. § 6003. The statute provides that

> (a) . . . [t]he United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, *upon the request of the United States attorney for such district,* an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination. . . .
>
> (b) *A United States attorney may,* with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—
>
> (1) the testimony or other information from such individual may be necessary to the public interest; and
>
> (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

(Emphasis added). The witness argues that the statute, by its express terms, requires that the request for im-

munity be made by the United States Attorney for the district.[4]

Although Congress has not expressly provided for statutory procedures when a United States Attorney recuses the entire office for one case, we believe that under the facts of this case, 28 U.S.C. § 515(a) provides an appropriate solution. Section 515 provides:

> (a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

The witness argues that Section 515(a) in inapplicable because a petition for immunity is not the conduct of a "legal proceeding." We reject such a rigid reading of the statute. This court examined the legislative history for section 515(a) in *Infelice* v. *United States*, 528 F.2d 204 (7th Cir. 1975). In *Infelice*, we concluded that the legislative history's "stated purpose was to grant to the 'special attorney' the same rights, powers and authority which the United States Attorneys possessed." *Id.* at 206. *See also*

[4] Since the United States Attorney has recused himself from this case however the witness concedes that the immunity request could not be made by Thomas Sullivan. Nonetheless, he argues that the district court, rather than the Attorney General, should have appointed a substitute under 28 U.S.C. § 546, allowing the district court "for the district in which the office of United States attorney is vacant" to appoint an interim U. S. Attorney. We do not believe that the office of United States Attorney is now "vacant."

United States v. *Wrigley*, 520 F.2d 362, 366 (8th Cir.), *cert. denied*, 423 U.S. 987 (1975). The House Report specifically stated that the bill granted special attorneys the same powers "district attorneys now have or may hereafter have in *presenting* and *conducting* proceedings before a grand jury or committing magistrate." H. R. Rep. No. 2901, 59th Cong., 1st Sess. (1906) (emphasis added). Immunity orders are an integral part of "presenting and conducting proceedings before a grand jury." Therefore it is possible to read section 515(a) as authorizing a special attorney to exercise the power of request delegated to a United States Attorney under 18 U.S.C. § 6003.

We conclude that 28 U.S.C. § 515(a) did empower the special attorney to request the immunity petition under 18 U.S.C. § 6003 in the circumstances of this case. Whether Section 515(a) should always be read to authorize a special attorney to exercise the powers of a United States Attorney under 18 U.S.C. § 6003 is a question we need not reach. In most instances it may be desirable, or perhaps even mandatory, for the United States Attorney for the district, or his designate, to participate in the section 6003 request. *See In re DiBella*, 499 F.2d 1175, 1177-78 (2d Cir.), *cert. denied*, 419 U.S. 1032 (1974).

The factual circumstances of this case, however, make it entirely appropriate to read section 515(a) as conferring section 6003 authority on the special attorney. Section 6003 will not be undermined by the construction here because two facts demonstrate that in this case, the special attorney should be considered to be the United States Attorney named in Section 6003. First, this is a case of recusal. The statute cannot be read to require the participation of a United States Attorney who has conflicting interests. It is, therefore, only reasonable to permit the individual essentially acting in his capacity—the special

attorney—to exercise the immunity power. Certainly this result is more consistent with the statutory purpose than permitting the witness to evade testifying in light of the conclusion reached by other courts that the statutory requirements "were not intended to protect witnesses but to minimize overuse of immunity grants." *United States* v. *Yanagita,* 552 F.2d 940, 947 (2d Cir. 1977). *Cf. In re Tierney,* 465 F.2d 806, 813 (5th Cir. 1972), *cert. denied,* 410 U.S. 914 (1973).

A second fact buttresses the conclusion that the special attorney is here acting in the capacity of the United States Attorney for the purposes of Section 6003. Before leaving office, Samuel Skinner, the United States Attorney preceding Mr. Sullivan, requested Mr. Civiletti (the Assistant Attorney General), to appoint a special attorney for this investigation. Mr. Skinner advised the Assistant Attorney General "that it would be in the best interest of the Department and all parties concerned that an attorney within the Department in Washington, D.C., be assigned to oversee the investigation. This attorney would have final authority to make the necessary investigative and prosecutorial decisions. . . ." Prior cases in this and other circuits have held that the requirements of section 6003 are satisfied when the request for immunity is made by a designate of the United States Attorney.[5] *Ryan* v. *Commissioner,* 568 F.2d 531 (7th Cir. 1977); *In re Grand Jury Proceedings,* 554 F.2d 712, 713 (5th Cir.), *cert. denied,* 434 U.S. 892 (1977); *United States* v. *Smith,* 532 F.2d 158

[5] We reject the argument forwarded by the witness that designation by Samuel Skinner would be ineffective, urging that a valid designation would have to derive from the present United States Attorney. We consider this designation valid both because Mr. Skinner made the request while still in office and because it would be less appropriate to have the designation made by the official with a conflict of interest.

(10th Cir. 1976). These cases are distinguishable since the delegations in issue were made to individuals subordinate and accountable to the United States Attorney. We are persuaded nonetheless that the underlying reasoning is applicable. The act of designation by the United States Attorney confers the status of the office on the designate. For this reason, Thomas Henderson is "the United States Attorney" authorized to seek immunity orders under section 6003 in the case for which he was designated. This case simply does not present the question of whether section 6003 would permit a special attorney to rely on section 515(a) powers to circumvent the United States Attorney in petitioning for immunity.

The judgment of the lower court upholding the validity of the immunity order is accordingly

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 23, 1979

Before

Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

No. 78-2505

IN THE MATTER OF THE SPECIAL
SEPTEMBER 1978 GRAND JURY (II)

JOHN F. WALL, Witness, *Appellant.*

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 78 GJ 560

JAMES B. PARSONS, *Judge.*

On consideration of the petition for rehearing filed in the above-entitled cause by appellant, John F. Wall, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Supreme Court, U. S.
FILED
APR 18 1979
MICHAEL RODAK, JR., CLERK

No. 78-1302

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN F. WALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1302

JOHN F. WALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of a civil contempt order arising out of a grand jury proceeding on the grounds that the acting United States Attorney in charge of the grand jury investigation was without power to seek a grant of immunity for petitioner's testimony (Pet. 14-20) and that, because petitioner is a state legislator, he was entitled to invoke a common-law legislative privilege (Pet. 20-21). However, petitioner purged himself of contempt by testifying, and review by this Court of that nonappealable order is not warranted.

1. In September 1978, petitioner was subpoenaed to appear before a grand jury in the United States District Court for the Northern District of Illinois.[1] Because the

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[1]As a result of this investigation, petitioner had previously been convicted of extorting money under color of official right in violation of the Hobbs Act, 18 U.S.C. 1951. *United States* v. *Wall*, No. 78-1601 (7th Cir. Dec. 11, 1978), cert. pending, No. 78-1347 (filed March 2, 1979).

regular United States Attorney in the Northern District of Illinois had disqualified himself and his office from this investigation, Thomas Henderson, a Department of Justice attorney designated by Assistant Attorney General Civiletti to be acting United States Attorney in this investigation, was in charge of these grand jury proceedings. Petitioner appeared before the grand jury on September 28 and refused to testify, claiming both a Fifth Amendment privilege against self-incrimination and a common-law speech or debate privilege for state legislators. Thereafter, Henderson obtained authorization from Assistant Attorney General Civiletti and petitioned the district court, pursuant to 18 U.S.C. 6003, for an order granting petitioner use immunity and ordering him to testify. Following entry of the immunity order, petitioner was again summoned to testify, and he again refused (Pet. App. 2).

On November 29, 1978, the district court found petitioner to be in civil contempt, and ordered him to be imprisoned for the duration of the grand jury (but not to exceed 18 months), or until petitioner agreed to testify (Pet. App. 2). The district court stayed this order until December 4, 1978, in order to allow petitioner to seek a further stay of the contempt order pending appeal. The court of appeals declined to grant the stay, and petitioner subsequently stated that he would testify rather than go to jail. On December 7, 1978, petitioner testified before the grand jury, thereby purging himself of the contempt.

On appeal, the court of appeals first concluded that petitioner's contentions were not moot because the government might call him before the same grand jury again and because petitioner sought to challenge the order of immunity as well as his duty to testify (Pet. App. 3-5). The court held, however, that Henderson had authority to

petition the court for an order of immunity (Pet. App. 5-9). The court did not consider whether petitioner could appeal from the now purged contempt order.[2]

2. At the outset, we note that the court of appeals was without jurisdiction to consider petitioner's appeal. It is well settled that the denial of a motion to quash a subpoena is not ordinarily an appealable order. *E.g.*, *United States* v. *Nixon*, 418 U.S. 683, 690-691 (1974); *United States* v. *Ryan*, 402 U.S. 530 (1971); *Cobbledick* v. *United States*, 309 U.S. 323 (1940); *Alexander* v. *United States*, 201 U.S. 117 (1906). Accordingly, a person who seeks to resist the production of evidence and wishes to establish his right to appellate review of an order compelling testimony must generally refuse to comply with that order and suffer the consequences of his contempt. See *United States* v. *Ryan, supra*, 402 U.S. at 532-533; *Cobbledick* v. *United States, supra*, 309 U.S. at 328. This case presents no exceptional circumstances warranting departure from this well-established rule.

That petitioner temporarily was held in civil contempt prior to his decision to testify does not render the district court's order denying petitioner's motion to quash the grand jury subpoena appealable. A grand jury witness is entitled to "no further protection * * * than that afforded by the district court until the witness chooses to disobey and is committed for contempt." *Cobbledick* v. *United States, supra.* Indeed, if momentary contempt followed by immediate compliance could render the denial of a motion to quash appealable, every grand jury witness could readily avoid the finality requirement of 28 U.S.C. 1291. See *United States* v. *Nixon, supra*, 418 U.S. at 690.

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[2]Since petitioner conceded that his legislative privilege claim was foreclosed at least in the Seventh Circuit by that court's decision in *United States* v. *Craig*, 537 F. 2d 957 (7th Cir.) (*en banc*), cert. denied, 429 U.S. 999 (1976), the court did not consider that claim either.

Such a result would have a deleterious effect upon grand jury investigations and would emasculate the "strong Congressional policy against piecemeal review, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals" that is embodied in Section 1291. See *United States* v. *Nixon*, *supra*, 418 U.S. at 690. Nor can petitioner avoid the finality requirement of Section 1291 by focusing his appeal on the order of immunity underlying his testimony rather than on the order denying his motion to quash the subpoena. See *In re Ryan*, 538 F. 2d 435 (D.C. Cir. 1976). In short, petitioner chose to testify, and he cannot thereafter undo that decision upon appeal. See *United States* v. *Ryan*, *supra*, 402 U.S. at 532.[3]

3. In any event, neither of petitioner's substantive arguments warrants review by this Court.

a. Petitioner contends (Pet. 14-20) that Henderson, the designated acting United States Attorney in this investigation, was not empowered to seek a grant of immunity under 18 U.S.C. 6003.[4] However, petitioner cannot contend that he suffered as a result of Henderson's request since the district court's order was, without question, sufficient to protect petitioner's Fifth Amendment rights even if Henderson's request for an immunity order were technically defective under 18 U.S.C. 6003. See

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[3]Although the government argued below that petitioner's claims were mooted by his decision to testify (a position to which we continue to adhere), no challenge was made to the court of appeals' power under Section 1291 to hear petitioner's claims. Nonetheless such a jurisdictional question may be raised in this Court for the first time. See *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737 (1976).

[4]Petitioner does not contend that Henderson was improperly designated as acting United States Attorney. See 28 U.S.C. 515(a); 28 C.F.R. 0.13. Nor does petitioner dispute that the proper officials in the Department of Justice authorized the request for an order of immunity.

United States v. *Monia*, 317 U.S. 424, 427-429 (1943); *Lefkowitz* v. *Turley*, 414 U.S. 70, 79-80 (1973); *Maness* v. *Meyers*, 419 U.S. 449, 475 (1975) (White, J., concurring). It is therefore not readily apparent that petitioner has standing to raise this claim, especially since the requirements of Section 6003 "were not intended to protect witnesses but to minimize overuse of immunity grants." *United States* v. *Yanagita*, 552 F. 2d 940, 947 (2d Cir. 1977). Compare *United States* v. *Giordano*, 416 U.S. 505 (1974).

Moreover, as the court of appeals correctly concluded (Pet. App. 5-9), Henderson was authorized by 28 U.S.C. 515(a) to "conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings * * * which United States attorneys are authorized by law to conduct * * *." And where, as here, the United States Attorney has disqualified himself, the acting United States Attorney must necessarily be able to seek a grant of immunity as a concomitant to his authority to conduct the grand jury investigation. See also *Ryan* v. *Commissioner*, 568 F. 2d 531, 540 (7th Cir. 1977), cert. denied, No. 77-1512 (Oct. 2, 1978); *In re Grand Jury Proceedings*, 554 F. 2d 712, 713 (5th Cir.), cert. denied, 434 U.S. 892 (1977); *United States* v. *Smith*, 532 F. 2d 158, 160 (10th Cir. 1976).

b. Petitioner also claims (Pet. 20-21) that he was entitled to invoke a legislative privilege akin to that provided by the Speech or Debate Clause of the United States Constitution. The issue whether such a legislative privilege exists under Rule 501 of the Federal Rules of Evidence is a substantial one. See *United States* v. *Gillock*, petition for cert. pending, No. 78-1455. However, this is not an appropriate case to consider this issue. As demonstrated above, petitioner is attempting to challenge a nonappealable order. Moreover, petitioner's voluntary decision to testify before the grand jury ended the actual controversy between the parties, thereby rendering his claim of privilege moot. See, *e.g.*, *County of Los Angeles*

v. *Davis*, No. 77-1553 (March 27, 1979); *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974); *North Carolina* v. *Rice*, 404 U.S. 244 (1971); *Golden* v. *Zwickler*, 394 U.S. 103 (1969).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1979

[5]Because it was petitioner's behavior that mooted his claims and not the action of the government nor the termination of the grand jury, this case does not present a situation "capable of repetition yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911).

DOJ-1979-04